**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **COLBURN R. BRACE** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 1,031,584 |
| **SPORTSMANS WAREHOUSE** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **TWIN CITY FIRE INSURANCE COMPANY** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent appeals the March 16, 2007 preliminary hearing Order of Administrative Law Judge Thomas Klein. Claimant appeared by his attorney, Joseph Seiwert of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, P. Kelly Donley of Wichita, Kansas.

Claimant was awarded medical benefits after the Administrative Law Judge (ALJ) determined that claimant's injury arose out of and in the course of claimant's employment. Respondent was ordered to provide a list of three physicians from which claimant is to choose an authorized treating physician. Respondent, relying on *Johnson*,[1] argues that claimant's injury, which occurred while claimant was walking, is a normal activity of day-to-day living and thus not compensable.

The record is the same as that considered by the ALJ and consists of the transcript of the February 27, 2007 Preliminary Hearing and exhibits, together with the pleadings contained in the administrative file.

## ISSUES

Did claimant suffer accidental injury arising out of and in the course of his employment with respondent?

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[1] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 147 P. 3d 1091, *rev. denied* 281 Kan. ___ (2006).

## FINDINGS OF FACT

Claimant, the camping department manager for respondent, was walking through an aisle in respondent's store on May 18, 2006, talking to an employee, when he felt a sharp stabbing pain on the top of his left foot. Claimant, being unable to continue walking, went down on all fours. He looked around to see if he had kicked something or tripped over something, but saw nothing. He was transported to the emergency room at Via Christi Regional Medical Center, where it was determined he had suffered a stress fracture of one of the bones in his left foot. Claimant has provided no additional explanation for this injury, except that he was walking.

## PRINCIPLES OF LAW

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[4]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental

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[2] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 2005 Supp. 44-501(a).

> injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[5]

K.S.A. 44-508(d) defines "accident" as,

> . . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.[6]

Injury or personal injury has been defined to mean,

> . . . any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.[7]
>
> An injury is not compensable unless it is fairly traceable to the employment and comes from a hazard which the worker would not have been equally exposed to apart from the employment.[8]
>
> An injury shall not be deemed to have been directly caused by the employment where the injury results from normal activities of day-to-day living.[9]

The Kansas Supreme Court categorizes risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character.[10]

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[5] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[6] K.S.A. 2005 Supp. 44-508(d).

[7] K.S.A. 2005 Supp. 44-508(e).

[8] *Johnson*, *supra*, at Syl. ¶ 1.

[9] *Id.* at Syl. ¶ 2.

[10] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

## ANALYSIS

Claimant contends that this injury resulted from claimant's work activities which required he be on his feet over 90 percent of his 50- to 55-hour workweek. The only medical information in this record comes from the emergency room notes of Via Christi Regional Medical Center, which provide no information regarding how this injury occurred. The Kansas Court of Appeals, in *Johnson*, cites *Martin*[12] and *Boeckmann*[13] as support for the well-established rule that when an injury occurs at work, it is not compensable unless it is "fairly traceable to the employment", as contrasted with hazards to which a worker "would have been equally exposed apart from the employment."[14]

The Court in *Johnson* determined that a worker who turned in her chair, and attempted to stand while reaching for a file, and injured her knee, was involved in an activity of day-to-day living. The mere act of standing was insufficient to allow claimant's activities to be described as arising out of her employment. The injury is compensable only if the "employment exposes the worker to an increased risk of injury of the type actually sustained."[15]

The court in *Johnson* found it significant that "Johnson had a history of 3 or 4 [prior] incidents of left knee pain." The claimant's treating physician, Dr. Jennifer Finley, testified that it looked like the claimant had suffered years of degeneration and had some previous problems, and it was just a matter of time before the knee injury occurred.

In this instance, claimant had no history of problems with his foot. Additionally, claimant's job required a significant amount of walking on hard surfaces. This Board Member concludes that the legislature did not intend for the "normal activities of

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[11] K.S.A. 44-534a.

[12] *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 300, 615 P.2d 168 (1980).

[13] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 734, 504 P.2d 625 (1972).

[14] *Johnson*, *supra*, at 789.

[15] *Id.*

day-to-day" living to be so broadly defined as to exclude disabilities caused or aggravated by the physical exertion of work.

## CONCLUSIONS

Claimant has proven that his injury, suffered in the course of his employment, actually arose out of that employment. The undersigned Board Member concludes the preliminary hearing Order should be affirmed.

## ORDER

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Thomas Klein dated March 16, 2007, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this ____ day of June, 2007.

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
P. Kelly Donley, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge